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No. 91-918

In the Supreme Court of the United States

OCTOBER TERM, 1991

KALAN INC. AND HOSPITAL CORPORATION OF AMERICA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Tariff Act of 1930, as amended, provides for the payment of interest by the government on a refund of "any amount paid as increased or additional duties" following a final computation (*i.e.*, liquidation) of import duties due on merchandise entering the country. 19 U.S.C. 1520(d). The question presented is whether this provision also authorizes payment of interest on any excess of estimated duties deposited at entry that is refunded to the importer after liquidation, even though no "increased or additional duties" have been assessed or collected.

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OPINIONS BELOW

The decision of the court of appeals in *Kalan, Inc.* v. *United States* (Pet. App. 1a-10a) is reported at 944 F.2d 847. The decision in *Hospital Corp. of America* v. *United States (HCA)* (Pet. App. 11a-12a) is unreported. The decision of the Court of International Trade in *Kalan* (Pet. App. 13a-20a) is reported at 752 F. Supp. 455, and the decision in *HCA* (Pet. App. 21a-29a) is reported at 752 F. Supp. 459.

JURISDICTION

The judgment of the court of appeals was entered in *Kalan* on September 11, 1991, and in *HCA* on September 20, 1991. The petition for a writ of cer-

tiorari was filed on December 6, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner Kalan Inc. (Kalan) imported plastic key tags from the Republic of Korea. Pet. App. 2a. The Customs Service classified the tags as jewelry and required Kalan to deposit estimated duties at entry based on that classification. *Ibid.* Subsequently, the Customs Service liquidated the entry "as entered." [1] No duty was refunded at the time of liquidation, nor was any increased or additional duty assessed. *Ibid.* Kalan then filed an administrative protest claiming that the key tags were misclassified on entry and should have received a duty-free classification. *Ibid.* After the Court of International Trade (CIT) decided in a related case that the key tags should be reclassified, the Customs Service reliquidated the entry and refunded the deposited duties to Kalan without interest. *Id.* at 2a-3a.

b. The Customs Service denied Kalan's protest requesting payment of interest on the refunded amount, and Kalan then brought this action in the CIT. Kalan argued that, under 19 U.S.C. 1505(c) and 1520(d),[2]

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[1] See 19 U.S.C. 1500. "Liquidation" is "the final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. 159.1

[2] Section 1505(c) provides in full:

> Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or

it was entitled to interest on the amount of estimated duties that were refunded at reliquidation from the date of deposit at entry.[3] The government argued that Section 1520(d) did not provide for interest on duties deposited at entry because Section 1520(d) is expressly limited to interest on refunds of amounts "paid as increased or additional duties under section 1505(c)," and no such amounts had been paid here. Pet. App. 16a-17a.

The CIT held that interest was payable on the refunded amount under Section 1520(d) from the date of liquidation. Pet. App. 13a-20a. Rejecting Kalan's claim for interest from an earlier date, the court held that "section 1520(d) does not grant interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties." *Id.* at 15a. In its view, however, upon liquidation, "the duties are no longer estimated," but instead are

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reliquidation at a rate determined by the Secretary of the Treasury.

Section 1520(d) provides in full:

> If a determination is made to reliquidate an entry as a result of a protest filed under section 1514 of this title or an application for relief made under subsection (c)(1) of this section, or if reliquidation is ordered by an appropriate court, interest shall be allowed on any amount paid as increased or additional duties under section 1505(c) of this title at the annual rate established pursuant to that section and determined as of the 15th day after the date of liquidation or reliquidation. The interest shall be calculated from the date of payment to the date of (1) the refund, or (2) the filing of a summons under section 2632 of title 28, whichever occurs first.

[3] The government conceded that Kalan was entitled to interest pursuant to 28 U.S.C. 2644 from the filing date of the summons commencing the suit to the date of the refund. Pet. App. 15a.

" 'duties determined to be due upon liquidation,' within the meaning of section 1505(c)." *Id.* at 16a. On this basis, it held, Kalan was entitled to interest on the entire refunded amount from the date of liquidation. *Id.* at 20a.

c. Both parties appealed, and the Federal Circuit reversed. Pet. App. 1a-10a. The court first noted that under *Library of Congress* v. *Shaw*, 478 U.S. 310, 314 (1986), an award of interest is barred by sovereign immunity absent an express statutory waiver. Pet. App. 4a-5a. It concluded that there was no such express waiver of sovereign immunity in this case. The court observed that Section 1520(d) authorizes interest only on amounts "paid as increased or additional duties," which are not the same as excess amount of estimated duties deposited at entry. *Id.* at 5a-6a. The court observed that "Customs assessed and Kalan paid *no* duties, 'increased' or 'additional,' at liquidation." Because estimated duties are due at the time of entry, not liquidation, the CIT had erred in ruling that these duties had become "duties determined to be due upon liquidation" within the meaning of Section 1505(c). Pet. App. 5a-6a. The court of appeals also observed that "the sole statutory provision dealing directly with the refund of excess deposits [19 U.S.C. 1520(a)] is silent about the addition of interest." *Id.* at 6a. The court of appeals then reviewed the legislative history of Sections 1520(d) and 1505(c), finding that it expressly confirmed that "[i]f any excess duties are being refunded, no interest is payable thereon." Pet. App. 7a (emphasis omitted) (quoting H.R. Rep. No. 1015, 98th Cong., 2d Sess. 67 (1984)).

2. a. Petitioner Hospital Corporation of America (HCA) imported a lithotripter, a medical device that uses sonic shock waves to disintegrate kidney stones.

Pet. App. 22a-23a. HCA deposited the estimated duty at the time of entry, and the entry was liquidated at the amount determined by the entry classification. HCA protested, claiming that the lithotripter should have received a different customs classification. After Customs adopted the classification suggested by HCA, it granted HCA's protest, reliquidated the entry, and refunded the excess amount of duty to HCA without interest. *Id.* at 23a-24a.

b. HCA unsuccessfully protested the failure to pay interest and then filed suit in the CIT. The CIT agreed that HCA was entitled to interest on the refund, holding that, even though HCA made no separate payment at liquidation, it "paid excess duties upon liquidation" because "the estimated duties on deposit with Customs were used to pay what [HCA] was found to owe upon liquidation." Pet. App. 27a. The CIT awarded HCA interest under Section 1520 (d) from the date of liquidation to the date the summons was filed in this action. *Id.* at 27a-28a.[4]

c. Relying on its decision in *Kalan*, the Federal Circuit reversed the award of interest under Section 1520(d). Pet. App. 11a-12a.

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[4] It also awarded HCA interest under 28 U.S.C. 2644 (see note 3, *supra*) from the date of the summons to the date the judgment was paid. Pet. App. 28a-29a.

ARGUMENT

Congress has conferred exclusive jurisdiction on the Federal Circuit to review decisions of the Court of International Trade, 28 U.S.C. 2645(c), thereby establishing it as the specialized and expert tribunal to resolve issues of the kind presented here. The decisions of the Federal Circuit in these cases are correct and do not conflict with any decision of this Court or any court of appeals. Further review is not warranted.

1. Petitioner argues that the "increased or additional duties" upon which interest is payable to the importer under Section 1520(d) include amounts paid *at entry* over and above the amount determined to be due at liquidation. That position is contrary to the plain language of the statute, which makes clear that interest is due only on amounts paid by the importer after liquidation over and above the amount deposited at entry. Section 1520(d) provides for interest only "on any amount paid as increased or additional duties under section 1505(c)." The terms "increased duties" and "additional duties" are terms of art in tariff law. As defined by the United States Tariff Commission (the predecessor of the International Trade Commission):

> Increased duties are the differences between the estimated duties paid upon entry and any increase of regular duties in the liquidated duties as determined by the collector.

Dictionary of Tariff Information 263 (1924). "Additional duties" are those duties "which are assessed in addition to the regular duties accruing under the law." *Ibid.*

The amounts on which interest is payable under Section 1520(d) are those "*paid*" as "increased" or

"additional" duties under Section 1505(c). That Section, in turn, refers to "[d]uties determined to be due *upon liquidation*," and indicates that those amounts are to be paid on or after liquidation (emphasis added). See Section 1505(c) (the amounts "determined to be due upon liquidation * * * shall be due 15 days *after* * * * liquidation * * * and unless payment of the duties is received * * * within 30 days *after* that date, shall be considered delinquent") (emphasis added). Section 1505(b) further provides that the Customs officer "shall collect any increased or additional duties * * * as determined on a liquidation or reliquidation." Thus, "increased or additional duties" assessed at liquidation are duties that are "collected" following liquidation: those duties are distinct from "estimated duties" deposited, and thus collected, at entry. See 19 U.S.C. 1505(a). In sum, the "increased" or "additional" amounts referred to in Section 1520(d) plainly represent money paid after liquidation, not at entry.[5]

Petitioners are not entitled to interest on their refunds of estimated duty under Section 1520(d) because they did not pay any "increased or additional

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[5] As the court of appeals noted (see p. 4, *supra*), the House Report confirms the plain language of the statute. Petitioners err in relying (Pet. 11) on the statement in the House Report that "[i]nterest would be paid on the amount of overcharge at a rate to be determined by the Secretary of the Treasury and determined as of the 15th day after the date of liquidation or reliquidation." H.R. Rep. No. 1015, *supra*, at 67. That statement is taken out of context. That portion of the Report addresses the rate and commencement date of the interest, rather than the type of "overcharge" to which interest applies. In any event, the statutory language does not employ the term "overcharge," but instead expressly specifies that "interest shall be allowed on any amount paid as increased or additional duties." 19 U.S.C. 1520(d).

duties" either at liquidation or at any other time. The refunds to petitioners were authorized by 19 U.S.C. 1520(a), which provides for the refund of excess duties deposited at entry whenever, as here, "it is ascertained on liquidation or reliquidation" that a lesser amount of duty is due. This Section, unlike Section 1520(d), does not authorize interest on the amounts refunded. In the absence of an express statutory authorization for interest, there can be no award of interest against the government. *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986).[6]

2. Petitioners argue that the government's interpretation of Section 1520(d) is contrary to Congress's intent because it results in an unfair disparity between the interest Customs pays on overpayments of duty and the interest importers pay on deficiencies in duty payments. Pet. 10-11.

To the contrary, the scheme of reciprocal interest payments is symmetrical and carries out Congress's intent. Section 1505(c) was enacted in 1984 to remedy delays in the payment of increased or additional duties assessed at liquidation. The law was in part a response to the decision in *United States* v.

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[6] In both *Kalan* and *HCA*, the CIT reasoned that the estimated duties deposited by both petitioners at the time of entry later became the duties determined to be due upon liquidation. Pet. App. 16a, 27a. As the Federal Circuit recognized, however, Section 1520(d) authorizes interest only on amounts that are "paid" under Section 1505(c) as "increased or additional duties" after liquidation—which do not include amounts paid at entry. Moreover, the CIT's construction of Section 1520(d) led it to conclude that petitioners were entitled to interest from the date of liquidation. As the Federal Circuit noted (Pet. App. 4a), that result is directly contrary to the language of Section 1520(d), which states that interest "shall be calculated from the date of payment." The only payments petitioners made were at the time of entry.

Heraeus-Amersil, Inc., 671 F.2d 1356 (C.C.P.A. 1982), in which the court barred Customs from initiating efforts to collect those duties until at least 270 days after liquidation. See Pet. App. 8a, 36a-37a. Section 1520(d) was enacted in recognition of "the inherent fairness of a reciprocity of payment of interest when the importer has been able to sustain his position [that a refund is due] in an appropriate forum * * * as regards increased or additional duties." Pet. App. 9a (quoting H.R. Rep. No. 1015, *supra*, at 68).

Thus, Sections 1520(d) and 1505(c) both authorize the payment of interest only on "increased" or "additional" amounts that the importer is required to pay following liquidation—that is, duties over and above amounts deposited at entry. Under Section 1520(d), Customs must pay interest if any such additional payments are subsequently refunded. Under Section 1505(c), the importer pays interest on late payment of additional unpaid amounts found to be due at liquidation. See Pet. App. 8a-9a, 37a. The statute does *not* require the importer to pay interest on deficiencies in estimated payments from the time of entry until the payment of the "increased" or "additional" amounts determined to be due on liquidation, but only from the date those "increased" or "additional" amounts are due until payment is made. Likewise, Customs does not pay interest to importers on refunds of excess estimated duties deposited at entry, but only on "increased" or "additional" duties that are paid to Customs after liquidation and are subsequently refunded. Hence, the scheme Congress enacted operates symmetrically; but, even if it did not, it would still be the scheme that the courts are bound to enforce.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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